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## Conviction Beyond a Reasonable Suspicion? The Need for Strengthening the Factual Basis Requirement in Guilty Pleas

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# CONVICTION BEYOND A REASONABLE SUSPICION? THE NEED FOR STRENGTHENING THE FACTUAL BASIS REQUIREMENT IN GUILTY PLEAS

Myeonki Kim\*

*Does the court, before accepting a guilty plea, check the accuracy of the plea agreement in any significant way? This article addresses the issues on judges being unconcerned or the inconsistent practice of guiding the stages of guilty plea. The article further suggests that the judge should carefully review its factual basis to avoid a wrongful guilty plea. Although Rule 11(b) of the Federal Rule of Criminal Procedure requires the judges to check the factual basis of the guilty plea, the rule is not paid much attention to legal professionals. Setting the adversarial culture aside, the rule itself has a structural problem not to be enforced properly during a plea colloquy. Instead of revising the rule, this article proposes a newer interpretation to induce judges more responsible to confirm the factual basis. This could be a practical solution 1) to filter out an inaccurate pleading guilty, 2) to increase the accountability of the prosecution in guilty plea, and 3) to help the defendant make more informed plea decisions.*

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## INTRODUCTION

The dominance of plea bargaining is apparent in the American criminal justice system.<sup>1</sup> Most cases are disposed of by guilty pleas, and trials are rarely held. Although plea bargaining has existed for a long time, there has been a rapid increase of guilty-plea cases recently.<sup>2</sup> As jury trials have become increasingly complex and time-consuming in the twentieth century, the prosecution and the defense have shown more preference towards expeditious, predictable plea bargaining.<sup>3</sup> Harsh sentencing rubrics, which arose from “tough on crime” policies, also facilitated this movement.<sup>4</sup> Even though there are conflicting views as to how to see and recognize the plea-bargaining process, plea bargaining is generally regarded as an essential element to reduce crowded dockets.<sup>5</sup>

If plea bargaining contributes to the search for truth or administering justice, the high ratio itself is not a problem. However, there is a growing disbelief in the accuracy of guilty pleas.<sup>6</sup> Although many assume a defendant to be an informed decision-maker in a guilty plea,<sup>7</sup> the credibility of guilty pleas is becoming questionable.<sup>8</sup> In fact, numerous exonerations have revealed that a large number of people are pleading guilty to crimes they did not commit.<sup>9</sup> In response to these growing concerns, the Supreme Court of the United States has begun addressing more cases involving plea bargaining.<sup>10</sup> Although many scholars have also proposed a variety of reforms in diverse aspects, the impact has been minimal.<sup>11</sup> Additionally,

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<sup>1</sup> See Part II.A.

<sup>2</sup> See John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 L. & SOC’Y REV. 261, 261-70 (1979).

<sup>3</sup> See Part II.A.

<sup>4</sup> See Part IV.C.

<sup>5</sup> See Part IV.B.

<sup>6</sup> See Part II.B.

<sup>7</sup> Stephanos Bibas, *The Myth of the Fully Informed Rational Actor*, 31 ST. LOUIS U. PUB. L. REV. 79, 80 (2011).

<sup>8</sup> See Part II.B.

<sup>9</sup> See Part II.B.

<sup>10</sup> See Part II.A.

<sup>11</sup> See Part II.C.

resources for the defense, which are essential to a guilty-plea process, are still insufficient.

This Article argues that judges should carefully check the factual basis of guilty pleas during plea hearings through a reinterpretation of existing rules.<sup>12</sup> More than a half-century ago, the Supreme Court obligated judges to confirm the factual basis of a plea agreement before accepting it.<sup>13</sup> Nevertheless, most judges tend to focus on confirming whether defendants are voluntarily pleading guilty and waiving their constitutional rights, rather than confirming the factual basis of the guilty plea. Moreover, there is no clear agreement among judges on the definition of “factual basis.”<sup>14</sup> The current system does not work properly because there are structural problems in the composition of the relevant rule in the Federal Rules of Criminal Procedure (FRCP).<sup>15</sup> If judges more actively interpreted the rules requiring confirmation, they would be obliged to establish a certain degree of guilt before accepting a guilty plea. Judges are in the best position to reform the problematic status quo of the plea-bargaining process, benefiting both the prosecutor and the accused.<sup>16</sup>

Given the central role of guilty pleas in the criminal justice system, the potential resistance to any reform of the plea-bargaining process must be considered carefully.<sup>17</sup> Judicial inertia, which is deeply rooted in the American adversarial system, will likely pose the greatest resistance to this argument.<sup>18</sup> It might be difficult for trial judges, who are already used to taking on neutral and passive roles, to actively intervene in an agreed-upon guilty plea. However, this Article contends that, currently, judges do not even play a minimum role as a neutral arbiter. It should be noted that it is the duty of the judge to find a factual basis before accepting a guilty plea. This Article will also refute other concerns regarding the enhanced judicial review for the

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<sup>12</sup> See Part III.B.

<sup>13</sup> See Part III.A.

<sup>14</sup> See Part III.A.

<sup>15</sup> See Part III.B.

<sup>16</sup> See Part III.C.

<sup>17</sup> See Part IV. Because plea bargaining is almost inevitable in disposing criminal cases, small changes can cause great impact, and ultimately strong resistance. Therefore, this paper addresses possible resistance in Part IV.

<sup>18</sup> See Part IV.A.

factual basis requirement, such as insufficient resources<sup>19</sup> and detriment to defendants.<sup>20</sup>

Part II analyzes the American plea-bargaining system, particularly focusing on its questionable practice and the limits of existing suggestions. Part III argues that the factual basis requirement in Rule 11(e) of the FRCP should be reinvigorated. Although this provision has been rather unnoticed, this Article suggests that its reinterpretation would instill a greater sense of responsibility in judges to find factual basis. Part IV refutes anticipated objections, because even a slight change in the plea-bargaining practice will bring a considerable change in the criminal justice system.

# I. THE QUESTIONABLE PRACTICE OF PLEA BARGAINING: BY-PRODUCT OF ADVERSARIAL EXCESSES

## A. *The American Way of Plea Bargaining*

Plea bargaining now dominates the American criminal justice system.<sup>21</sup> As Justice Kennedy pointed out, the American system “is for the most part a system of pleas, not a system of trials,”<sup>22</sup> and plea bargaining “is not some adjunct to the criminal justice system; it is the criminal justice system.”<sup>23</sup> It may be hard for judges, prosecutors, and defense counsel to imagine a criminal procedure without plea bargaining. Scholars have long been aware of this trend towards plea bargaining: most articles discussing plea-bargaining issues present evidence that most criminal cases are disposed

<sup>19</sup> See Part IV.B.

<sup>20</sup> See Part IV.C.

<sup>21</sup> Of course, this did not happen all at once. Professor Wayne R. LaFave explains that many factors are comprehensibly contributable to plea bargaining’s current status. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 1195 (W. Acad. 6th ed. 2017). According to LaFave, these factors include an increased number of cases, the emergence of professional law enforcement agencies and defense counsel, cumbersome and expensive jury trials, the due process revolution, the harshness of criminal law, unpredictable sentencing practices, and the desire of prosecutors and judges to get convictions. *Id.* Put simply, the expansion of plea bargaining arose from three distinct factors: (1) administrative convenience, (2) modernization of the criminal justice system, and (3) severe punishments within the current system. *Id.*

<sup>22</sup> *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). In another case on the same day, Kennedy also warned that “[t]he reality is that plea bargains have become so central to the administration of the criminal justice system . . . it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.” *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012).

<sup>23</sup> *Frye*, 566 U.S. at 144 (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

of through guilty pleas.<sup>24</sup> Students assigned to observe jury trials should be concerned about losing the increasingly rare opportunity to actually observe such a trial. Professor Marc Galanter's well-known "vanishing trial" has already become commonplace in American criminal courts.<sup>25</sup>

Although plea bargaining is now widely used, surrounding controversies still persist. The issue that typically arises is related to understanding plea bargaining and addressing its existing problems accordingly. A majority of legal professionals view plea bargaining as no more than a contract.<sup>26</sup> For them, it is merely a different type of adversarial process, in which parties bargain for a mutually agreed-upon outcome.<sup>27</sup> One of the strong supporters of this assertion, Judge Frank H. Easterbrook, argues that "[p]lea bargaining is a form of contract, and its regulation through the common-law process is fundamentally no different from the way courts treat other contracts."<sup>28</sup> According to Judge Easterbrook, the lessons of commercial law apply equally to the plea-bargaining practice; thus, proposals to regulate plea bargaining would inevitably cause side effects.<sup>29</sup> Therefore, he argues that the focus must be not on the system of plea bargaining, but on the defendants' inherent disadvantage and how to correct it.<sup>30</sup>

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<sup>24</sup> See, e.g., Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1206 (1975) (concerning the fact that Alschuler's article was written over forty years ago, which indicates that the dominance of plea bargaining is not a recent event); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1119 (2011); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009).

<sup>25</sup> See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

<sup>26</sup> See Frank H. Easterbrook, *Plea Bargaining is a Shadow Market*, 51 DUQ. L. REV. 551 (2013); Scott & Stuntz, *supra* note 23, at 1911–12.

<sup>27</sup> Scott & Stuntz, *supra* note 23, at 1935.

<sup>28</sup> See Easterbrook, *supra* note 26, at 551.

<sup>29</sup> See *id.* at 551–52. In his article, Judge Easterbrook states that:

[P]roposals to regulate plea bargaining have the same limitations and consequences as proposals to regulate commercial contracts. Ban it, and it continues but goes underground, as in many states before they gradually recognized its legitimacy during the 1960s and 1970s. Black markets predominate when lawful markets are forbidden—but black markets are characterized by less information, more fraud, and few guarantees of voluntary action. Far better to acknowledge the practice and get the terms in writing; contract law has a Statute of Frauds for very good reason.

*Id.*

<sup>30</sup> See *id.* at 553–54.

Others present different views.<sup>31</sup> They point out that the real practice of plea bargaining contains many non-adversarial features,<sup>32</sup> such as Gerard E. Lynch's *Our Administrative System of Criminal Justice*.<sup>33</sup> Even if "plea bargaining grows out of an adversarial ideology," it is "a system of justice that actually looks, to most defendants, far more like . . . an inquisitorial system" than an adversary model.<sup>34</sup> The prosecutors' role in plea bargaining is closer to an adjudicatory function, because their priority is to make accurate, appropriate decisions after reviewing evidence; negotiation is rather limited and subsidiary.<sup>35</sup>

More than 50 years ago, Professor Herbert L. Packer made a similar claim through his famous *Two Models of The Criminal Process*.<sup>36</sup> Professor Packer argued that plea bargaining is largely based on the Crime Control Model, which "places heavy reliance on the ability of investigative and prosecutorial officers, acting in an informal setting in which their distinctive skills are given full sway, to elicit and reconstruct a tolerably accurate account of . . . an alleged criminal event."<sup>37</sup> In contrast, he claimed that the Due Process Model, which rejects "informal fact[-]finding processes as definitive of factual guilt and [insists] on formal, adjudicative, adversary fact[-]finding processes . . . [before] an impartial tribunal," rarely exists in the guilty-plea process.<sup>38</sup>

These contrasting views explain why it took so long for the plea-bargaining system to become a dominant feature of the American legal system. Although plea bargaining had already become a common practice in the United States during the mid-1800s,<sup>39</sup> the practice of plea bargaining did

<sup>31</sup> See, e.g., Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 83 FORDHAM L. REV. 1673 (2015); Barkow, *supra* note 24.

<sup>32</sup> See Barkow, *supra* note 24, at 871 ("In the current era dominated by pleas instead of trials, federal prosecutors are *not merely law enforcers*. They are the *final adjudicators* in the vast majority of cases." (emphasis added)).

<sup>33</sup> Lynch, *supra* note 31.

<sup>34</sup> Lynch, *supra* note 31, at 1677. An inquisitorial system is "[a] system of proof-taking used in civil law, whereby the judge conducts the trial, determines what questions to ask, and defines the scope and the extent of the inquiry." *Inquisitorial System*, BLACK'S LAW DICTIONARY 913 (10th ed. 2014).

<sup>35</sup> Lynch, *supra* note 31, at 1683.

<sup>36</sup> See Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

<sup>37</sup> *Id.* at 14. Packer goes on to say, "any general view of the guilty plea in this country at the present time would disclose practices that conform far more closely to the Crime Control than to the Due Process Model." *Id.* 50–51.

<sup>38</sup> *Id.* at 14.

<sup>39</sup> John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants*

not gain legitimacy in the legal community until long after that.<sup>40</sup> It was not until 1967 that the American Bar Association noted the necessity of plea bargaining due to resource limitations and thereafter embraced the practice.<sup>41</sup> Then, in the 1970s, the Supreme Court first admitted the constitutionality of plea bargaining<sup>42</sup> and officially acknowledged its several advantages, which the Court thought were essential to the modern criminal justice system.<sup>43</sup>

However, even after this acknowledgment, the Court has remained reluctant to intervene in the plea-bargaining practice. For example, the Court initially refused to accept Ineffective Assistance of Counsel appeals (IAC), even though there was a lack of clarity about what constitutes IAC in plea bargaining.<sup>44</sup> It was only a few years ago that *Padilla v. Kentucky*,<sup>45</sup> *Missouri v. Frye*,<sup>46</sup> and *Lafler v. Cooper*<sup>47</sup> recognized IAC claims during plea negotiations.<sup>48</sup> In *Padilla*, the Court required that immigration consequences of a conviction should be made known to a non-citizen defendant before

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*Who Plead Guilty*, 100 CORNELL L. REV. 157, 162 (2014) (citing JENIA I. TURNER, PLEA BARGAINING ACROSS BORDERS: CRIMINAL PROCEDURE 9 (Hiram E. Chodosh ed., 2009)).

<sup>40</sup> See *Brady v. United States*, 397 U.S. 742, 753 (1970) (approving the constitutionality of plea bargaining); Blume & Helm, *supra* note 39 (“The constitutionality of the practice . . . was not firmly established until 1970.”).

<sup>41</sup> Blume & Helm, *supra* note 39 (citing AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 2 (1967)).

<sup>42</sup> *Brady*, 397 U.S. at 753 (“[W]e cannot hold that [plea bargaining] is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.”).

<sup>43</sup> See, e.g., *Santobello v. New York*, 404 U.S. 257, 260 (1971) (“[P]lea bargaining[]’ is an essential component of the administration of justice . . . If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”).

<sup>44</sup> See LAFAVE ET AL., *supra* note 21, at 1231 (“There is greater uncertainty as to what [effective assistance of counsel] means in a guilty plea context as compared to a trial context . . .”).

<sup>45</sup> *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010) (holding that the defendant should hear the immigration consequences of a guilty plea under the Sixth Amendment right to counsel).

<sup>46</sup> *Missouri v. Frye*, 566 U.S. 134, 141 (2012) (noting that a guilty plea is invalid because counsel “provided incorrect advice pertinent to the plea”).

<sup>47</sup> *Lafler v. Cooper*, 566 U.S. 156, 176 (2012) (ruling that a state habeas petitioner can argue ineffective assistance of counsel when trial counsel deficiently advises him to reject a favorable plea bargain, even though he is convicted in a fair trial).

<sup>48</sup> Thus, it seems that the Court is no longer reluctant to assess the plea-bargaining process under the IAC rubric.



entering a guilty plea.<sup>49</sup> *Frye* and *Lafler* mandated that counsel's communication and advice during plea negotiation should be correct.<sup>50</sup> "In order that benefits [of plea bargaining] can be realized," the Court emphasized, "criminal defendants require effective counsel during plea negotiations."<sup>51</sup>

In those cases, the Court emphasized the predominant role of plea bargaining, which virtually replaced trial, and seemed to signal that this was the primary reason for justifying its decision to accept IAC claims.<sup>52</sup> However, the criminal justice system had long been governed by plea bargaining.<sup>53</sup> After plea bargaining gained constitutional legitimacy, the last several decades witnessed only a slight change in its proportion.<sup>54</sup> The real reason for the slow shift of IAC jurisprudence may be the Court's ongoing reluctance to "acknowledge either the existence or the legitimacy of plea negotiations."<sup>55</sup> The great controversy that would be expected to follow after any plea-bargaining decision could be another reason; both *Frye* and *Lafler* were 5–4 decisions.<sup>56</sup> These long-delayed changes show the degree to which plea bargaining is a controversial and complicated area to regulate.

The above discussion leads to two conclusions. First, plea bargaining is a sort of by-product inevitably derived from the cumbersome jury trial, which symbolizes the American legal system. Both sides, whether plea bargaining is viewed as adversarial or inquisitorial, admit the need for increased efficiency.<sup>57</sup> Second, the area of plea bargaining has long been

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<sup>49</sup> *Padilla*, 559 U.S. at 369.

<sup>50</sup> *Lafler*, 566 U.S. at 168 ("If a plea bargain has been offered, a defendant has the right to effective assistance of counsel . . . . If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in . . . the imposition of . . . more severe [consequences]."); *Frye*, 566 U.S. at 145 ("[D]efense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.").

<sup>51</sup> *Frye*, 566 U.S. at 144.

<sup>52</sup> *Lafler*, 566 U.S. at 170; *Frye*, 566 U.S. at 143; *Padilla*, 559 U.S. at 372.

<sup>53</sup> See *supra* note 20 and accompanying text.

<sup>54</sup> See *supra* note 20 and accompanying text.

<sup>55</sup> See LAFAVE ET AL., *supra* note 21, at 1231.

<sup>56</sup> *Lafler*, 566 U.S. at 175–87 (noting that Justices Scalia, Thomas, Roberts, and Alito joined in the dissent); *Frye*, 566 U.S. at 151 (noting that Justices Scalia, Thomas, Alito, and Roberts joined in the dissent).

<sup>57</sup> See Easterbrook, *supra* note 26, at 552 ("Prosecutors have limited budgets and want to induce guilty pleas so that they can bring more cases, using the resources released when they don't have to take each defendant to trial."); Lynch, *supra* note 31, at 1698 ("The existing system of prosecutorial administration has arisen because the traditional adversarial model

unregulated for whatever reasons. Some argue it is better not to artificially regulate plea bargaining like a contract; the Court has just avoided the discussion. Thus, although plea bargaining is regarded as “an essential component”<sup>58</sup> in the American adversarial system, it is, ironically, by and large exempted from the type of formal adversary oversights on which the American system is generally based.<sup>59</sup>

B. *Doubts Surrounding the “Accurate” Plea Bargaining Process*

The nature of plea bargaining itself, such as whether it implements adversarial or non-adversarial ideology, or whether it is tightly regulated, is not at issue in this Article. The question is whether its present practice helps the courts in their search for the truth or administration of justice.

Ideally, only those who have committed crimes would plead guilty, and innocent people would walk free. For a period of time, the courts were convinced that the existing practice of plea bargaining was close to an ideal status. As the Court pointed out, if plea bargaining is “[p]roperly administered, it is to be encouraged” because it eliminates many negatives of a trial, such as time-consuming procedures.<sup>60</sup> However, contrary to the conventional belief that innocent people do not plead guilty, reliable data on wrongful convictions clearly reveals that innocent people sometimes do plead guilty.<sup>61</sup> As of now, more than 380 reported exonerations have reversed convictions obtained by guilty pleas.<sup>62</sup>

Determining how problematic the current plea-bargaining practice is presents a difficult task. Little is known about the real practice of plea bargaining: for instance, a psychological study that intended to measure the “accuracy of criminal process” failed to address the guilty-plea issue because

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has become too ex-pensive, contentious, and inefficient to be restored, at least given present levels of criminal conduct and judicial resources.”).

<sup>58</sup> *Santobello v. New York*, 404 U.S. 257, 260 (1971).

<sup>59</sup> See Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 214 (2006) (“Our system has already slipped away from the adversarial model, and has become instead an ‘administrative system of criminal justice,’ managed by the prosecutor’s office rather than the courts.” (quoting Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998))).

<sup>60</sup> *Santobello*, 404 U.S. at 260.

<sup>61</sup> See NAT’L REG. EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited Jan. 27, 2018) (follow “Browse Cases” drop down; then follow “Detailed View;” enter “Guilty Plea” into the “Filter” search bar)(reporting that there have been 380 exonerations in cases in which the conviction was obtained by a guilty plea).

<sup>62</sup> *Id.*

“it does not readily lend itself to psychological experimentation.”<sup>63</sup> The concern was that the “defendants’ decisions to plead guilty are [still] based on sparse, uncertain, and questionable evidence that will rarely be subjected to any meaningful scrutiny.”<sup>64</sup> While plea bargaining gained constitutional legitimacy after *Brady*,<sup>65</sup> it is still carried out as though it were on the black market.<sup>66</sup> Accordingly, whether the current plea-bargaining practice induces accurate outcomes is subject to a recurring controversy.

Given that defendants’ guilty pleas are no longer highly reliable, it is worth reviewing how and why the plea-bargaining practice rarely concerns itself with accuracy. For a rough estimate of accuracy, there is one simple and intuitive factor to consider—the standard of proof. In a trial, the accuracy of a conviction is guaranteed through a high burden of proof, “beyond a reasonable doubt,” which the prosecution is obligated to establish.<sup>67</sup> However, in a guilty plea, there is no clear standard like this. One criticism is that “with mere probable cause, the prosecutor can secure a conviction in almost all cases.”<sup>68</sup> After being charged only on the basis of probable cause, rational defendants are pressured to plead guilty to avoid trial penalty, even if the prosecutions’ cases are weak.<sup>69</sup> Thus, Professor Gregory M. Gilchrist indicates that, in guilty-plea cases, “the effective burden of proof for the prosecution can be reduced to mere probable cause.”<sup>70</sup> If this is true, wrongful guilty pleas can lead to miscarriages of justice.<sup>71</sup>

However, in real practice, guilty-plea cases can be disposed of by an even lower standard than probable cause. Most standards of proof used in investigation and prosecution tend to be perfunctory.<sup>72</sup> It is difficult to

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<sup>63</sup> DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 10–13 (2012).

<sup>64</sup> *Id.* at 10.

<sup>65</sup> *Brady v. United States*, 397 U.S. 742, 753 (1970) (approving the constitutionality of plea bargaining).

<sup>66</sup> RONALD JAY ALLEN ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE* 1206 (2d ed. 2005).

<sup>67</sup> *In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

<sup>68</sup> Lucian E. Dervan et al., *Voices on Innocence*, 68 FLA. L. REV. 1569, 1589 (2016).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> See *Malley v. Briggs*, 475 U.S. 335, 353 (1986) (discussing that police are not in a neutral position to enforce probable cause).

determine whether officers arrest a suspect based on “probable cause”<sup>73</sup> or mere “reasonable suspicion.”<sup>74</sup> The same might be true in a prosecutorial charging decision.<sup>75</sup> This is not because the standards themselves are ambiguous,<sup>76</sup> but because they are not enforced by neutral and detached judicial officers; prosecutors are self-regulated. The first judicial stage in prosecution (and investigation) with any standard of proof is a preliminary hearing.<sup>77</sup> Here, the judge decides whether there is enough evidence to force the defendant to stand trial based on a “probable cause” standard. However, for various reasons, defendants often waive the preliminary hearing right and proceed to trial.<sup>78</sup>

Although defendants can subsequently file a motion to suppress evidence, some defendants find this option closed to them. Prosecutors sometimes make plea offers contingent on the defendants forgoing motions to suppress evidence. Thus, some defendants do not file a motion simply because it is too risky and may cost them their opportunity to plea bargain. Even in other situations, defense counsel often advise defendants that it is in their best interest to not provoke more tension amongst the court and prosecutor by waiving their right to raise issues. Putting these strategic reasons aside, defendants also face structural disadvantages; defendants are sometimes adversely situated because of the burden of proof for suppression,<sup>79</sup> and hindsight and outcome bias may discourage judges from suppressing evidence after they see probative evidence that was obtained

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<sup>73</sup> BLACK’S LAW DICTIONARY, *supra* note 34, at 1395 (defining “probable cause” as “[a] reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime”).

<sup>74</sup> *Id.* at 1676 (defining “reasonable suspicion” as “[a] particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity”).

<sup>75</sup> This is because the role of prosecutors is inherently adversarial.

<sup>76</sup> See Orin Kerr, *Why Courts Should Not Quantify Probable Cause*, in THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THE THEMES OF WILLIAM J. STUNTZ 131, 132 (Michael Klarman et al. eds., 2012) (“[The] courts should not quantify probable cause because quantification would lead to less accurate probable cause determinations.”).

<sup>77</sup> BLACK’S LAW DICTIONARY, *supra* note 34, at 1371 (defining “preliminary hearing” as “[a] criminal hearing (often conducted by a magistrate) to determine whether there is sufficient evidence to prosecute an accused person”).

<sup>78</sup> Paul Bergman, *When Does It Make Sense to Waive the Preliminary Hearing?*, NOLO, <http://www.nolo.com/legal-encyclopedia/when-does-sense-waive-the-preliminaryhearing.html> (last visited Jan. 27, 2018) (presenting several reasons why a defendants would waive their right to a preliminary hearing).

<sup>79</sup> See LAFAYE ET AL., *supra* note 21, at 673.

illegally.<sup>80</sup> In most criminal cases, any applied standard of proof for a guilty plea to be accepted is, at best, “probable cause” or possibly “reasonable suspicion.”

While rather cursory, guilty pleas could be disposed of through such a low threshold. The spate of recent overturned wrongful convictions, arising from incorrect guilty pleas, have created a strong suspicion about the reliability of the current plea-bargaining system. This present condition requires increased attention to the practice of plea bargaining. Although plea bargaining “*is the criminal justice system*”<sup>81</sup> in America, more fair and accurate outcomes are ensured primarily through jury trials.<sup>82</sup> As Professor Stephanos Bibas points out, “[w]e can no longer count on jury trials as backstops, ensuring that bargains are fair and accurate because bargains are struck in the shadow of the adversarial process.”<sup>83</sup> More troubling is the fact that much is still unknown about the reality of the plea-bargaining practice and its effects.<sup>84</sup>

Despite the growing doubts about the sufficiency of plea bargaining, the Court has not directly addressed this issue. Instead, as an indirect way to assure that plea bargains are based on actual guilt, the Court seems to focus on insufficient information given to defendants during plea negotiations. As noted, in *Padilla*, *Frye*, and *Lafler*, the Court held that certain types of information must be given to defendants before they enter guilty pleas and if such information is not given, IAC claims should be allowed.<sup>85</sup> However,

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<sup>80</sup> For a brief explanation of hindsight and outcome bias, see Barbara O’Brien & Keith Findley, *Psychological Perspectives: Cognition and Decision Making*, in EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD 35, 37–38 (Allison D. Redlich et al. eds., 2014).

<sup>81</sup> *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

<sup>82</sup> STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 13 (2012).

<sup>83</sup> Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055, 1081 (2016).

<sup>84</sup> See *supra* note 59–62 and accompanying text.

<sup>85</sup> The Court explained that although defendants have no right to plea bargaining, “[w]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution.” *Lafler v. Cooper*, 566 U.S. 156, 168 (2012) (quoting *Evitts v. Lucey*, 469 U.S. 387, 401 (1985)). This approach means that the Court intends to indirectly place plea bargaining into the constitutional criminal procedure rubric, like a right to appeal. *Id.* (“[C]riminal defendants have a right to effective assistance of counsel in direct appeals even though the Constitution does not require States to provide a system of appellate review at all.” (citing *Evitts v. Lucey*, 469 U.S. 387 (1985))). Given the increased importance of plea bargaining, injecting constitutional procedural rights

there are some barriers to cross for such claims. For a right to counsel to be effective, not only should public defense resources be substantially increased, but the IAC claim must also be properly asserted as intended, not as an anomaly.<sup>86</sup> This is not an easy obstacle to overcome. Thus, up until now, it was unclear how recent changes of IAC jurisprudence would contribute to increasing the accuracy of guilty pleas.

When cases are disposed of by guilty plea, the judicial standard for accepting the plea seems to be surprisingly low. With the emergence of numerous wrongful convictions after plea bargaining, the belief that an innocent person would not plead guilty is no longer certain. Although the IAC claim in a plea negotiation is now available, its utility is yet unknown.

### C. *The Limits of Existing Research*

Even though the Court's expressed interest in plea bargaining is recent, many scholars have long explored this issue. Various studies—except for empirical studies with actual data—have been conducted from doctrinal, historical,<sup>87</sup> comparative,<sup>88</sup> economic,<sup>89</sup> and institutional<sup>90</sup> perspectives. These studies attempt to address the existing problems of plea bargaining and suggest a variety of ways to improve it. The studies classify the individual actors of the judicial system into three categories and proffer remedies for each: (1) prosecutor—limiting his discretion (power) to balance the playing field; (2) judge—increasing his role to ensure justice served; and (3) defense counsel—emphasizing and supporting his role.<sup>91</sup> They could be used as guidelines for remedying the current inaccuracies of guilty-plea practice.

However, while wide-ranging reforms are necessary (as extensive research implies), even small changes in plea bargaining could face strong resistance.<sup>92</sup> This is because the American criminal system is already well

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therein was predictable to some extent.

<sup>86</sup> BIBAS, *supra* note 82, at xvi (noting that constitutional rights of defendants are mostly used as *mere bargaining chips*).

<sup>87</sup> See, e.g., Langbein, *supra* note 2.

<sup>88</sup> See, e.g., Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004); Turner, *supra* note 59.

<sup>89</sup> See, e.g., Gene M. Grossman & Michael L. Katz, *Plea Bargaining and Social Welfare*, 73 AM. ECON. REV. 749 (1983); Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713 (1988).

<sup>90</sup> See, e.g., Barkow, *supra* note 24.

<sup>91</sup> This is simply because they are three main actors in the plea-bargaining process.

<sup>92</sup> See *infra* notes 98–101 and accompanying text.

adapted to the current practice. Given this status quo, identifying where and how to begin reforms is a difficult decision. That decision requires determining which reform will be the most realistic, efficient, and most importantly, powerful. With this critical view in mind, this Article briefly reviews existing studies in each of the three categories mentioned above.

First, although limiting prosecutorial discretion appears desirable, it is not easy to implement this kind of proposal. In the United States, most elected district attorneys exercise wide prosecutorial discretion, based on the appearance of strong political support.<sup>93</sup> Thus, their discretion is largely controlled by their political responsibilities, rather than established judiciary rules.<sup>94</sup> In addition, America's apparent preference for the principle of free markets supports prosecutors' extensive discretion.<sup>95</sup> This deeply entrenched ideological principle creates a reluctance to restrain prosecutors' discretion to negotiate with defendants.<sup>96</sup> Accordingly, regulating or limiting their discretion possibly means imposing restrictions on American democracy and the free market economy.

Moreover, regulating the prosecution's discretion requires a very cautious approach, because the criminal justice system is intricately interconnected. As Frank J. Remington once noted, "an effort to eliminate or reduce discretion at one stage in the process where it is visible, such as in trial court sentencing, will create a risk that discretion will merely shift to another stage where its exercise is less visible, such as the charging and guilty plea stages."<sup>97</sup> In a similar vein, if a prosecutor's discretion is reduced, the discretion might move to an even more invisible, currently unforeseen, place. This shows that it is not easy to regulate the discretion of the prosecutor.

Second, to guarantee the accuracy of a guilty plea, the idea of increasing the judicial role in plea negotiation has been widely discussed.<sup>98</sup>

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<sup>93</sup> See DARRYL K. BROWN, *FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW* 16–17 (2016).

<sup>94</sup> See *id.*

<sup>95</sup> See *id.*

<sup>96</sup> See *id.*

<sup>97</sup> Frank J. Remington, *The Decision to Charge, the Decision to Convict on a Plea of Guilty, and the Impact of Sentence Structure on Prosecution Practices*, in *DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY* 73, 110 (Lloyd E. Ohlin & Frank J. Remington eds., 1993).

<sup>98</sup> See, e.g., Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059 (1976); Turner, *supra* note 59.

However, less attention has been paid to plea colloquy proceedings.<sup>99</sup> This Article argues that reinforcing the judge's role in plea colloquy bears a greater examination, not only because Rule 11(c)(1) of the FRCP and precedents explicitly prohibit judicial participation in plea negotiation,<sup>100</sup> but primarily because increasing the judge's role in plea negotiation is more difficult and unlikely than in plea colloquy.

Some argue that increasing judicial participation in plea negotiation could reduce the abuse of prosecutorial discretion and improve accuracy and transparency.<sup>101</sup> "While all of these concerns [about judicial participation] are valid," plea bargaining based on harsh sentencing policy "might coerce an innocent defendant to plead guilty."<sup>102</sup> Thus, judicial involvement in plea negotiation should "promote accuracy and fairness in plea bargaining."<sup>103</sup> A valid point, yet it seems incompatible with plea-bargaining jurisprudence. Both democracy and free market ideology encourage parties to negotiate plea conditions with few constraints.<sup>104</sup> Furthermore, the deeply entrenched adversarial culture in America has no compunction in promoting agreements in both civil and criminal cases.<sup>105</sup> In this context, plea bargaining is usually treated more or less as a contract based on both parties' free will.<sup>106</sup> This is

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<sup>99</sup> BLACK'S LAW DICTIONARY, *supra* note 34, at 1339 (defining "plea colloquy" as "[a]n open-court dialogue between the judge and a criminal defendant, [usually] just before the defendant enters a plea, to establish that the defendant understands the consequences of the plea").

<sup>100</sup> FED. R. CRIM. P. 11(c) (1) (West 2017). Rule 11, in pertinent part, provides:

(c) PLEA AGREEMENT PROCEDURE.

(1) *In General*. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. *The court must not participate in these discussions.*

*Id.* (emphasis added).

<sup>101</sup> See Turner, *supra* note 59, at 204.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 214.

<sup>104</sup> *Infra* note 106–12 and accompanying text.

<sup>105</sup> Gerard E. Lynch noted:

While some special rules apply to criminal cases, in its essential structure a *criminal case is nothing more than an ordinary lawsuit*: the state, like a private party in a tort or contract action, is just one entity that may come before the court to present a claim for relief, and the defendant is nothing more or less than the party from whom that relief is sought.

Lynch, *supra* note 31, at 1676–77 (emphasis added).

<sup>106</sup> See Easterbrook, *supra* note 26, at 551.



the central problem with increasing judicial involvement in plea negotiations themselves.

In contrast, reinforcing a judge's role in a plea colloquy is relatively acceptable, since the proceeding is administered after the completion of plea negotiations. Judicial intervention in this stage does not restrict either party's discretion to negotiate but partially restrains the scope and available methods of case disposal. Thus, this approach would be a more appropriate way to strengthen courts' involvement in the guilty-plea process. Most judges usually focus on the defendant's voluntary waiver of procedural rights in a plea colloquy,<sup>107</sup> and are rarely concerned about the substance of the guilty plea.<sup>108</sup> Although the reliability of a guilty plea has become increasingly important, there have been no overt changes to match that increase.<sup>109</sup> Accordingly, increasing the judge's role in the plea colloquy, particularly on the substance of the plea agreement, is worth examination as a potential solution.<sup>110</sup>

Third, many scholars have consistently highlighted the importance of the defense counsel's role in plea bargaining.<sup>111</sup> Placing the defendant on equal footing with the state in plea bargaining is crucial in the adversarial setting; thus, the significance of effective assistance of counsel is obvious. Moreover, given the current status quo of insufficient counsel in criminal litigation,<sup>112</sup> the importance of the defense counsel's role in plea bargaining

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<sup>107</sup> See Part II.B.

<sup>108</sup> See Part II.B.

<sup>109</sup> Turner, *supra* note 59, at 212 ("At present, the factual basis inquiry into the plea is often perfunctory.").

<sup>110</sup> This issue is examined in detail in Part III.

<sup>111</sup> See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2545–47 (2004).

<sup>112</sup> Professor Robert A. Kagan states that:

Although most (not all) state legislatures have steadily increased appropriations for public defenders' offices and assigned criminal defense counsel, these expenditures have not kept pace with the volume of criminal cases. . . . Numerous studies have concluded that public defenders, while hardworking and generally competent, are 'terribly overburdened.' . . . [A] New York City study . . . found that court-appointed defense lawyers filed written pretrial motions on procedural issues in only 11 percent nonhomicide felony cases, but even this exceeded the proportion of cases in which appointed defense lawyers visited the crime site (4 percent), interviewed witness (4 percent), and used experts to challenge the prosecution's evidence (2 percent).

should already be emphasized. Yet this is not a realistic remedy, as resources for public defense are inevitably limited. Additionally, because of political resistance, strong skepticism exists regarding increased funding for public defenders.<sup>113</sup> Thus, Professor Stephanos Bibas claims that it is a better idea to “set it aside.”<sup>114</sup> Accordingly, an alternative solution should be found.

## II. A REALISTIC ALTERNATIVE: REINVIGORATING THE FACTUAL BASIS REQUIREMENT

### A. *The Factual Basis Requirement: Unnoticed Safeguard*

As noted, most of the existing suggestions for improving the current plea bargain system are somewhat infeasible. Strengthening the court’s role in plea colloquy is plausible, unless the courts continue to focus only on confirming procedural guarantees before accepting guilty pleas, rather than reviewing the substance of plea agreements.<sup>115</sup>

The courts were not always indifferent to the reliability of plea bargaining. In 1966, the Supreme Court amended Rule 11 of the FRCP.<sup>116</sup> The amendment required a “factual basis” before cases were disposed of by guilty plea.<sup>117</sup> It primarily intended to “impose a duty on the court” to satisfy itself that “there is a factual basis for the plea before entering judgment.”<sup>118</sup> The rule advisory committee’s note explains that this requirement would

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(citation omitted).

<sup>113</sup> Bibas, *supra* note 82, at 1070.

<sup>114</sup> *Id.*

<sup>115</sup> The Court is primarily concerned with the defendant’s voluntariness of plea, understanding of charge, understanding of possible consequences, and understanding of the rights waived, because they are directly relevant to the defendant’s constitutional rights. *See* LAFAVE ET AL., *supra* note 21, at 1248–55.

<sup>116</sup> FED. R. CRIM. P. 11 advisory committee’s note to 1966 amendment.

<sup>117</sup> In *Brady*, the Court stated in dicta:

A defendant may plead not guilty, guilty, or with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a *factual basis* for the plea.

*Brady v. United States*, 397 U.S. 742, 744 n.3 (1970).

<sup>118</sup> FED. R. CRIM. P. 11 advisory committee’s note to 1966 amendment.

protect a defendant who pleads guilty voluntarily, “with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.”<sup>119</sup> The note further elucidates that the court should confirm that “the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty.”<sup>120</sup> This change subjected guilty pleas to “considerable scrutiny,” and it was one of many attempts by the Warren Court to extend individual rights.<sup>121</sup> The Court noted that the amended Rule 11 intended to provide “greater guidance to trial judges.”<sup>122</sup> This rule remains almost the same today.<sup>123</sup>

After a few years of revision, the Court showed its willingness to strictly enforce the new Rule 11 in *McCarthy v. United States*.<sup>124</sup> The *McCarthy* Court emphasized the importance of the factual basis requirement by noting that, “because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> See Terry L. Elling, *Guilty Plea Inquiries: Do We Care Too Much?*, 134 MIL. L. REV. 195, 211 (1991).

<sup>122</sup> *Id.* at 212.

<sup>123</sup> The current Rule 11, in the pertinent part, provides:

(b) CONSIDERING AND ACCEPTING A GUILTY OR NOLO CONTENDERE PLEA.

(1) *Advising and Questioning the Defendant.* Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

...

(2) *Ensuring That a Plea Is Voluntary.* Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) *Determining the Factual Basis for a Plea.* Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

FED. R. CRIM. P. 11(b).

<sup>124</sup> *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

possesses an understanding of the law in relation to the facts.”<sup>125</sup> The Court subsequently quoted the Rule 11 Advisory Committee’s note to explain what the factual basis requirement intended to protect and what judges should do when determining factual basis.<sup>126</sup> Although the primary issue in *McCarthy* concerned the judge’s personal inquiry in to whether the defendant understood the nature of the charge,<sup>127</sup> the Court also mandated that a judge should “scrupulously” follow Rule 11, including the factual basis requirement.<sup>128</sup>

Subsequently, the Burger Court reduced the importance of the factual basis requirement.<sup>129</sup> In *North Carolina v. Alford*,<sup>130</sup> the Court admitted a new kind of guilty plea, which continues to be a controversial subject.<sup>131</sup> The Court held that “[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.”<sup>132</sup> Despite the fact that the defendant was in fact denying the crime, the Court did not require the judge to scrutinize a plea agreement more thoroughly. Professor Albert W. Alschuler noted that the Court made “the requirement of a factual basis . . . relatively unimportant,” because the Court “did not specify what kind of hearing a trial court must conduct before accepting [an *Alford*] plea . . . .”<sup>133</sup> Absent a mandatory hearing, Alschuler was concerned that most guilty pleas would be accepted, simply because some evidence gathered during investigation could easily meet the factual basis requirement.<sup>134</sup>

This conclusion needs to be examined further: the *Alford* Court did not necessarily send a signal.<sup>135</sup> In *Alford*, the petitioner pled guilty but

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 467 (quoting FED. R. CRIM. P. 11 advisory committee’s note to 1966 amendment).

<sup>127</sup> *Id.* at 463.

<sup>128</sup> *Id.* at 471.

<sup>129</sup> See, e.g., Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179, 1292–93 (1975); Steven Schmidt, Note, *The Need for Review: Allowing Defendants to Appeal the Factual Basis of a Conviction After Pleading Guilty*, 95 MINN. L. REV. 284, 288–90 (2010).

<sup>130</sup> *North Carolina v. Alford*, 400 U.S. 25 (1970).

<sup>131</sup> *Id.* at 37.

<sup>132</sup> *Id.*

<sup>133</sup> Alschuler, *supra* note 129, at 1292.

<sup>134</sup> *Id.*

<sup>135</sup> See LAFAVE ET AL., *supra* note 21, at 1257 (“The [*Alford*] Court did not state just how strong this factual basis must be, but it would appear that when a pleading defendant denies

claimed his innocence during plea colloquy in order to avoid a death penalty.<sup>136</sup> The Court did not reject this practice, because “an express admission of guilt . . . is not a constitutional requisite to the imposition of criminal penalty.”<sup>137</sup> However, the Court emphasized that the validity of an *Alford* guilty plea “cannot be seriously questioned,”<sup>138</sup> because the strong evidence of actual guilt in the record “substantially negated [the defendant’s] claim of innocence.”<sup>139</sup> It is possible that the jurisprudence of the *Alford* Court is largely attributable to the sufficient evidence in the plea records. In other words, if there had been no strong evidence in the record, it is doubtful that the Court would have held the plea constitutional. Although the holding did not specify an evidentiary hearing, the Court also noted that “the Constitution is concerned with the *practical consequences*” of a guilty plea.<sup>140</sup> Accordingly, it is arbitrary to conclude that *Alford* altered the importance of factual basis. Instead, the Court provided states with discretion to accept another form of guilty plea.<sup>141</sup>

Because of this confused history, the factual basis requirement has received less attention than it should have. This even may have caused extreme inconsistencies in interpreting the factual basis requirement among courts. Professor Jenia I. Turner carefully researched this point by analyzing federal cases and interviewing legal officials.<sup>142</sup> She noted:

One court has defined the [factual basis requirement] as “sufficient evidence at the time of the plea upon which the court may reasonably determine that the defendant likely committed the offense.” Others have simply required “some factual basis.” Mere admissions of guilt by the defendant are often sufficient to support a guilty plea. Many courts have allowed judges to read the indictment to the defendant and then merely to inquire whether he committed the acts in

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the crime the *factual basis must be significantly more certain* than will suffice in other circumstances.” (emphasis added)).

<sup>136</sup> North Carolina v. Alford, 400 U.S. 25, 28 (1970).

<sup>137</sup> *Id.* at 37.

<sup>138</sup> *Id.* at 38.

<sup>139</sup> Uncommonly, “[b]efore the plea was finally accepted by the trial court, the court heard the sworn testimony of a police officer who summarized the State’s case. Two other witnesses besides Alford were also heard.” *Id.* at 28.

<sup>140</sup> *Id.* at 37 (emphasis added).

<sup>141</sup> See Ballard v. Burton, 444 F.3d 391, 397 (5th Cir. 2006) (“[The courts] view an *Alford* plea as nothing more than a variation of an ordinary guilty plea.”).

<sup>142</sup> Turner, *supra* note 59, at 212–13.

question. In other courts, the prosecutor's summary of the evidence or submission of a probable cause affidavit is enough.<sup>143</sup>

An astonishing variety of interpretation and application of the factual basis requirement exists among the federal courts. It seems that each court or individual judge has its own way. It is not clear whether this is an area where great flexibility or discretion is particularly required. Instead, it is more appropriate to note that the Warren Court reform has not been realized as intended. Particularly noteworthy is that, in some courts, either mere admission or a probable cause affidavit is sufficient to meet the factual basis requirement.<sup>144</sup> If so, these courts have added nothing after the 1966 revision of Rule 11 of the FRCP. Thus, some have asserted that, in the American judicial system, a factual basis requirement is "relatively unimportant"<sup>145</sup> and "more form than substance."<sup>146</sup>

The status quo in state courts appears to differ little from the federal courts. One Indiana trial judge, Earl G. Penrod, surveyed 50 judges (receiving responses from 36) to learn how Indiana trial court judges understand and establish the factual basis requirement in plea cases.<sup>147</sup> Penrod noted that, even among the judges, there was no consensus about what "factual basis" meant.<sup>148</sup> He also found that judges used a variety of methods in handling the factual basis requirement.<sup>149</sup> Penrod concluded that trial judges inconsistently applied the factual basis requirement and failed to protect defendants' rights in the interests of efficiency.<sup>150</sup> As a result, he asserted that, "[a]lthough a

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.* (citation omitted).

<sup>145</sup> Alschuler, *supra* note 129, at 1293.

<sup>146</sup> Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 930 (1980).

<sup>147</sup> See Earl G. Penrod, *The Guilty Plea Process in Indiana: A Proposal to Strengthen the Diminishing Factual Basis Requirement*, 34 IND. L. REV. 1127 (2001).

<sup>148</sup> *Id.* at 1139-42.

<sup>149</sup> Penrod states that:

Seven judges indicated that the factual basis process is conducted primarily by the judge, fourteen respondents indicated that the factual basis procedure is conducted primarily by the prosecutor, seven judges reported that the factual basis is primarily established by the defense attorney, and eight respondents advised that the factual basis resulted primarily from the combined efforts of the judge and the prosecutor.

*Id.* at 1138.

<sup>150</sup> See *id.* at 1138-43.

simple, ‘Did you do it?’ may be a bit unrefined, a straightforward inquiry and an unqualified affirmative response must be part of the record.”<sup>151</sup>

Faced with these problems, some legal scholars have pointed out the need to reinvigorate the factual basis requirement in guilty pleas. Strengthening judicial control in plea colloquy, to prevent weak cases from being disposed of by guilty plea, is a possible solution.<sup>152</sup> Maximo Langer suggests that the standard of proof in meeting the factual basis requirement in plea colloquy should be “beyond a reasonable doubt,” and that the prosecutor should present a sworn affidavit containing a summary of the evidence to convince the judge.<sup>153</sup> Similarly, William J. Stuntz argues that a judge should carefully review the factual basis during plea colloquy, giving little deference to a prosecutor’s case.<sup>154</sup> As an example, Stuntz cites the military court’s practice, which meticulously reviews the factual basis in a record.<sup>155</sup> Both ideas may help guarantee an accurate guilty plea. However, as both of these ideas are only small parts of Langer’s and Stuntz’s broad studies, neither author gave any detailed explanation on how to achieve these goals.<sup>156</sup>

#### B. *Ways to Reinvigorate the Factual Basis Requirement*

The current disregard of the factual basis requirement is problematic because the requirement is the only opportunity for substantial judicial review before the case is disposed of. Given the questionable accuracy of guilty pleas,

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<sup>151</sup> See *id.* at 1150.

<sup>152</sup> Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 276–77 (2006).

<sup>153</sup> *Id.*

<sup>154</sup> WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 302–03 (2011).

<sup>155</sup> *Id.* at 302–03. He states that:

Military courts (along with a few state appellate courts) offer a useful model: they review the factual basis of guilty pleas with great care, and with little deference to the pleas themselves. That should be the norm everywhere. Stringent appellate review, with reversal in cases of what the military calls improvident pleas, would amount to a procedural tax on pleas. Tax anything and one is likely to see less of it. Plus, military-style review of guilty pleas would make the pleas that remain more accurate—a large social gain. Such review would also shift power from prosecutors to judges, another social gain.

*Id.* (citation omitted).

<sup>156</sup> Langer addresses this topic in only one page of his 77-page article. See Langer, *supra* note 152, at 276–77. Stuntz also discusses the issue in only one short paragraph in his 413-page posthumous book. STUNTZ, *supra* note 154.

it is difficult to maintain the present perfunctory practice. Reinvigorating the factual basis requirement will increase the reliability of guilty pleas by pushing the judge to closely examine the substance of cases.

However, there is an overlooked problem in the process of establishing the factual basis of guilty pleas. This problem is hidden away in the 1966 rule advisory committee note, which explains the amended FRCP Rule 11. The relevant note says that, when determining the factual basis, “[t]he court should satisfy itself . . . that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty.”<sup>157</sup> Simply put, the rule states that the court should satisfy itself whether the defendant’s admitted conduct constitutes the charged offense or not. This requirement appears to be quite clear and thus could be expected to ensure the accuracy of a guilty plea: however, this is not the case.

To understand why, we need to first analyze formalism—the legal reasoning theory that prevailed from the 1870s to the 1920s in the United States.<sup>158</sup> Formalism considers a judge’s role as “simply locating the correct preexisting rule and applying it to the fact.”<sup>159</sup> This legal reasoning assumes that “the law is rationally determinate,” and “adjudication is thus autonomous from other kinds of reasoning.”<sup>160</sup> Therefore, the syllogistic reasoning in formalism can be expressed as follows: “The figure of its reasoning is the stating of a rule to certain facts, a finding that the facts of the particular case are those certain facts and the application of the rules a logical necessity.”<sup>161</sup> This is based on traditional syllogism (major premise, minor premise, and conclusion).<sup>162</sup> Through this reasoning, formalists usually argue that all cases could come to only one conclusion. Although this is still an important part of

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<sup>157</sup> FED. R. CRIM. P. 11 advisory committee’s note to 1966 amendment.

<sup>158</sup> Brian Leiter, *Legal Formalism and Legal Realism: What is the Issue?*, 6 (Univ. Chi. Pub. L. & Legal Theory Working Paper No. 320, 2010), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1646110](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1646110).

<sup>159</sup> See Jack L. Landau, *Logic for Lawyers*, 13 PAC. L.J. 59, 65 (1981).

<sup>160</sup> Leiter, *supra* note 158, at 1 (quotation marks omitted).

<sup>161</sup> Landau, *supra* note 159 (emphasis added) (quoting John M. Zane, *German Legal Philosophy*, 16 MICH. L. REV. 287, 338 (1918)).

<sup>162</sup> *Id.* 67–68.



judicial reasoning today,<sup>163</sup> few judges are exclusively dependent on this reasoning.<sup>164</sup>

Interestingly, the paraphrased text of the 1966 advisory committee note and the legal reasoning process in formalism are very similar. Below are comparisons of each corresponding element between the note and formalistic reasoning.

| 1966 Advisory Committee Note   | Formalistic Reasoning  |
|--|--|
| “the charged offense” <sup>165</sup>                                 | “the stating of a rule to certain facts” <sup>166</sup>                                  |
| “the defendant’s admitted conduct” <sup>167</sup>                    | “a finding that the facts of the particular case are those certain facts” <sup>168</sup> |
| “The court should satisfy itself . . . to constitute” <sup>169</sup> | “the application of the rule[] [is] a logical necessity” <sup>170</sup>                  |

The first row of the 1966 Advisory Committee Note, “the charged offense,” matches with the first row of the formalistic reasoning, “the stating of a rule to certain facts.” They both address the applicable rule of each case, which would be the major premise in syllogism. The second row of the Note, “the defendant’s admitted conduct,” is very similar to the second row of the formalistic reasoning, “a finding that the facts of the particular case are those certain facts.”<sup>171</sup> They deal with the facts of each case, which could be characterized as the minor premise in the syllogism. The third row of the Note, “The court should satisfy itself . . . to constitute,”<sup>172</sup> is also analogous to the third row of reasoning, “the application of the rule[] [is] a logical necessity.”<sup>173</sup> Both of these are the conclusions in each case. It is not clear whether FRCP Rule 11 is in fact promulgated based on this logic. It is fair to

<sup>163</sup> See Ernest J. Weinrib, *The Jurisprudence of Legal Formalism*, 16 HARV. J.L. & PUB. POL’Y 583, 585–91 (1993) (discussing formalism as “a theory of legal justification”).

<sup>164</sup> RICHARD A. POSNER, REFLECTIONS ON JUDGING 108 (2013) (“There is no uniform approach. . . . Most federal court of appeals judge’s cluster in the central portion of the spectrum, with some leaning toward formalism and others toward realism, but none, or very few, being all one thing or all the other. Indeed, realism includes formalism as a special case—formalism is the realistic approach to many cases.”).

<sup>165</sup> *Supra* note 137 (paraphrasing the original text).

<sup>166</sup> Landau, *supra* note 159.

<sup>167</sup> *Supra* note 137 (paraphrasing the original text).

<sup>168</sup> Landau, *supra* note 159.

<sup>169</sup> *Supra* note 137 (paraphrasing the original text).

<sup>170</sup> Landau, *supra* note 159.

<sup>171</sup> *Id.*

<sup>172</sup> *Supra* note 137 (paraphrasing the original text).

<sup>173</sup> Landau, *supra* note 159.

say, however, that when a judge looks for the factual basis requirement, he or she is generally following formalistic legal reasoning.

The application of formalism here, however, makes the process of finding a factual basis virtually meaningless. This is not to say formalism itself is a problem.<sup>174</sup> Instead, formalism may not work properly in an environment like a plea colloquy. The first two processes of formalistic legal reasoning, “the stating of a rule applicable to certain facts” and “a finding that the facts of the particular case,” require a judge’s active recognition and interpretation.<sup>175</sup> Thus, these processes should involve actively going back and forth between laws and facts. However, in a plea colloquy, this process may be transformed into the cursory syllogistic process, because pleading guilty is presumed to include both the defendant’s voluntary admission to his conduct (i.e., “a finding that the facts of the particular case”) and charged offense (i.e., “the stating of a rule applicable to certain facts”).<sup>176</sup> This admission is likely to oversimplify the formalistic reasoning process, because the judge would rely on the defendant’s admissions and omit his own active recognition and interpretation process. More likely than not, many judges would not struggle to deviate from this shortcut and may not feel the need for additional argument. Thus, the factual basis requirement is doomed to be structurally neglected.

This problem requires a different approach. The 1966 advisory note says “[t]he court should *satisfy* itself . . . that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty.”<sup>177</sup> In the *Oxford Dictionaries*, the definition of “satisfy” is to “[p]rovide (someone) with adequate information or proof so that they are convinced about something.”<sup>178</sup> If this definition is applied to construe the Note, then a judge

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<sup>174</sup> For criticism of formalism, see Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

<sup>175</sup> See Leiter, *supra* note 158, at 2 (“[Formalistic] legal reasoning is *not mechanical*, that it demands the identification of valid sources of law, the interpretation of those sources, the distinguishing of sources that are relevant and irrelevant, and so on, and they offer a theoretical account of how these various bits of reasoning are done ‘rightly.’” (emphasis added)).

<sup>176</sup> *Brady v. United States*, 397 U.S. 742, 748 (1970) (“Central to the plea and the foundation for entering judgment against the defendant is the defendant’s admission in open court that he committed the acts charged in the indictment.”).

<sup>177</sup> FED. R. CRIM. P. 11 advisory committee’s note to 1966 amendment (emphasis added).

<sup>178</sup> *Satisfy*, OXFORD LIVING DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/satisfy](http://www.oxforddictionaries.com/us/definition/american_english/satisfy) (last visited Jan. 27, 2018). Of the five meanings of “satisfy”

must provide himself with adequate information or proof, so that he is convinced to the standard criticized above.

In interpreting the 1966 Advisory Note, if one put an emphasis on the word *proof*, it would no longer allow the judge to rely on the above cursory syllogistic process. This approach may induce judges to establish the factual basis requirement under the standard of proof rubric, which will lead judges to assume a greater responsibility in plea colloquy.<sup>179</sup> Instead of simply relying on the defendant's voluntary admission, the judge must personally find the rule of "the charged offense" and the fact of "the defendant's admitted conduct."<sup>180</sup> Formalistic legal reasoning would then work more properly.

Given that standards of proof in charging decisions and in prior judicial proceedings are rather perfunctory,<sup>181</sup> the standard of proof for the factual basis requirement should be at least "preponderance of evidence,"<sup>182</sup> or preferably "clear and convincing evidence."<sup>183</sup> This suggestion needs no revision of Rule 11 of the FRCP; a new interpretation is all that is needed. Interestingly, some courts have already adopted this approach. In an earlier case, after the revision of Rule 11, the U.S. Court of Appeals for the D.C. Circuit recognized that the factual basis requirement could be used as guidance for judges to find the probability of conviction for a guilty plea.<sup>184</sup> Other state courts have similarly noted that the factual basis requirement is

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included, this one is the most analogous to the usage in the advisory note.

<sup>179</sup> See Note, *The Trial Judge's Satisfaction as to the Factual Basis of Guilty Pleas*, 1966 WASH. U. L. Q. 306, 320 (1966) (finding a factual basis, "[i]f no specific burden is established, the amount of evidence needed will be dependent upon the diligence of the trial judge").

<sup>180</sup> See *supra* note 169–74 & accompanying text.

<sup>181</sup> See Part II.B.

<sup>182</sup> BLACK'S LAW DICTIONARY, *supra* note 34, at 1373 (defining "preponderance of evidence" as "[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force" or "superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other").

<sup>183</sup> *Id.* at 674 (defining "clear and convincing evidence" as "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain").

<sup>184</sup> The court noted that the factual basis requirement in Rule 11, Fed. R. Crim. P. is "consistent with a probability-of-guilt standard, . . . [t]he committee's purpose was that the court itself be satisfied of the factual basis for the plea, rather than rely exclusively on defendant and his counsel." *Bruce v. United States*, 379 F.2d 113, 119 (D.C. Cir. 1967).

met when the record contains “enough that the court may say with confidence the prosecution could prove the accused guilty of the crime charged.”<sup>185</sup>

It might be argued that no standard of proof really functions properly, given the inherent ambiguity in interpreting each standard.<sup>186</sup> Empirical studies have shown the lay persons’ inconsistency in applying the standard of proof.<sup>187</sup> Although these results are not directly applicable to professional judges, it is not clear whether the newly established standard will make much difference. However, from pretrial proceeding to post-conviction relief, judicial proceedings inevitably rely on a judge’s decisions, based on numerous standards of proof.<sup>188</sup> Accordingly, a primary concern should not be the ambiguity of any standards, but rather the absence of a standard of review in guilty pleas. At the very least, this Article’s suggestion would prevent those cases that only meet a “probable cause” (or merely a “beyond a reasonable suspicion”) standard.

The idea of reinvigorating the factual basis requirement has several additional benefits. First, changes initiated by judicial officers are more realistic. As noted, existing proposals to regulate prosecutors or to increase defense resources face virtually insurmountable obstacles.<sup>189</sup> In contrast, the judiciary is relatively well positioned to lead changes, considering its professional knowledge and political support. This judicial-based suggestion may not be the most desirable option, but it could be feasible enough to break up the standoff in guilty pleas.

In addition, the increased responsibility for a judge to find a factual basis could positively impact prosecution. Prosecutors often do not carefully develop case files because of the expectation of reaching a plea agreement.<sup>190</sup> Even in weak cases, many defendants plead guilty, as almost all cases are disposed of by guilty pleas.<sup>191</sup> Thus, current practices still involve the risk of

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<sup>185</sup> *Jones v. State*, 936 So.2d 993, 999 (Miss. Ct. App. 2006) (quoting *Corley v. State*, 585 So. 2d 765, 767 (Miss. 1991)).

<sup>186</sup> See SIMON, *supra* note 63, at 195–97.

<sup>187</sup> See *Id.* at 195–96 (discussing empirical research about lay persons’ understanding of the standard of proof).

<sup>188</sup> For instance, the “probable cause” standard is used during preliminary hearings, and various standards are also used at the appellate level.

<sup>189</sup> See *supra* note 130–31 and accompanying text.

<sup>190</sup> See Part IV.B.

<sup>191</sup> Many scholars have discussed the problem of plea bargaining a case with weak evidence. See, e.g., Jenia I. Turner, *Prosecutors and Bargaining in Weak Cases*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 102, 102–06 (Erik Luna & Marianne Wade eds., 2012).

convicting innocents.<sup>192</sup> Reinvigorating the factual basis requirement will induce prosecutors to develop the weaker cases to meet the specific standard of proof for pleas.<sup>193</sup> By doing this, prosecutors would have stronger case files or could discover previously unknown exculpatory evidence. Both are good results and strengthen the dependability and accuracy of the system.

Likewise, strengthening the factual basis requirement will bring a positive effect to present pre-plea discovery practice. In some jurisdictions, the scope of pre-plea discovery is very narrow<sup>194</sup> because, as Professor Turner noted, “the Supreme Court has never held that the prosecution’s evidence must be disclosed to the defendant *before* a guilty plea.”<sup>195</sup> However, if the judge has a new obligation, this narrow practice could be changed. With an increased responsibility to find factual basis, judges will want to see more evidence prior to plea colloquy, and prosecutors will be obliged to disclose more evidence. These increased responsibilities of both judge and prosecutor will extend the scope of discovery before plea colloquy. This Article’s suggestion would lead to broad discovery (ideally open file discovery),<sup>196</sup> which would help participants in criminal proceedings make more informed decisions.<sup>197</sup>

### C. *How It Would Work*

However, even if the necessity and premise for strengthening the factual basis requirement is recognized, a smooth transition is not guaranteed.

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<sup>192</sup> *Id.* at 105.

<sup>193</sup> Of course, the resource problem also applies to the prosecution. Part IV.B addresses this issue in detail.

<sup>194</sup> See Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285, 313–16 (discussing the pre-plea discovery practice between an “open-file” model (North Carolina) and a “closed-file” model (Virginia)).

<sup>195</sup> *Id.* at 287 (citing *United States v. Ruiz*, 536 U.S. 622, 628–32 (2002)) (emphasis added).

<sup>196</sup> BLACK’S LAW DICTIONARY, *supra* note 34, 1263 (defining “open-file discovery” as “[a] case-specific policy in which prosecutors allow defense counsel to see (but not always to obtain copies of) all the documents in their file relating to the defendant”).

<sup>197</sup> Some criminal justice officials are still skeptical about open file policy because they consider that the *Brady* rule is sufficient to protect defendants’ rights. See *Brady v. Maryland*, 373 U.S. 83, 86(1963) (noting that prosecutors have to disclose exculpatory and impeachment evidence before trial). They also note that, in practice, broader discovery than required by law is already provided by many prosecutors. See Turner & Redlich, *supra* note 194. However, Professor Jenia I. Turner, in her study of comparing open file practice (North Carolina) with closed file discovery practice (Virginia), empirically shows that the former actually provides more material and exculpatory evidence to defendants and makes the guilty plea process more efficient. See *id.*

American lawyers are already accustomed to the present guilty-plea practice and may not be familiar with placing the additional burden on the judge in a plea-colloquy stage.<sup>198</sup> Moreover, “[m]any judges seem to believe that prosecutors know more about specific cases than they do,” and thus “exercise a ‘light touch’ when it comes to their oversight of guilty pleas.”<sup>199</sup> They simply note that there is not much evidence presented during plea colloquy.<sup>200</sup> It is thus necessary to overcome these conventions for this proposal’s potential to be realized, and steps must be taken to guide this process.

First, the appropriate role of the judge in plea colloquy should be clarified. In jury trials, a judge acts as a gate keeper who addresses evidentiary matters; the judge’s important role is to decide the appropriate evidentiary issues to protect the jury from developing biases or prejudice.<sup>201</sup> However, a plea colloquy is somewhat different from a jury trial. In a plea-colloquy proceeding, judges are obligated to find a factual basis before accepting a guilty plea; here, the judge operates as a fact-finder.<sup>202</sup> If a judge fails to reach a certain standard of proof in forming a factual basis—after a thorough review of materials and hearing statements—the judge can also directly request additional information. A plea judge does not need to remain passive. Like the judges’ role in either a detention hearing<sup>203</sup> or a warrant judgment proceeding, where judges are expected to lead the proceeding and give a decision based on a clear standard, in plea hearings, judges can and should play a more important role.

Critics may point out that even active judges are not well-equipped to find a concrete factual basis in plea colloquy. This view is based on a traditional belief that facts are mostly found in trial, where most of the evidence is presented.<sup>204</sup> Appellate courts’ “extreme deference” to trial courts’ fact finding is based on this conventional belief. American lawyers assume that the fact-finding ability of appellate courts is significantly limited,

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<sup>198</sup> See Part IV.A.

<sup>199</sup> Richard L. Lippke, *Reforming Plea Bargaining*, in *THE NEW PHILOSOPHY OF CRIMINAL LAW* 173, 177 (Chad Flanders & Zachary Hoskins eds., 2016).

<sup>200</sup> See *id.*

<sup>201</sup> FED. R. EVID. 103(c); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) (establishing the “gatekeeping role for the judge”).

<sup>202</sup> See Part III.A.

<sup>203</sup> BLACK’S LAW DICTIONARY, *supra* note 34, at 836 (defining “detention hearing” as “[a] hearing to determine whether an accused should be released pending trial”).

<sup>204</sup> Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 619 (2009).

because not much evidence is presented.<sup>205</sup> However, this Article’s proposal could extend the scope of the evidence presented before or during the plea colloquy. This is because greater responsibilities on the judge and the prosecutor are expected to broaden the range of pre-plea discovery.<sup>206</sup>

Even without this change, judicial fact finding in plea colloquy is not necessarily impossible. A plea-colloquy stage is still open to minimum fact finding, as appellate courts reviewing “cold record”<sup>207</sup> also have some leeway. The institutional competence of appellate courts in fact finding is due to a number of factors:<sup>208</sup> (1) the advantages of carefully reviewing a transcript; (2) the absence of misleading witness demeanor; (3) the advantage of professional judges’ experience; and (4) the equal condition in reviewing circumstantial and documentary evidence with the trial court.<sup>209</sup> Simply put, the appellate courts have their own means of finding facts. Plea judges could enjoy all or some of those means.

Plea judges can find facts by thoroughly reviewing materials, including plea agreements, complaints, and police reports.<sup>210</sup> Although these materials might not be as substantial or comprehensive as a trial transcript, they nonetheless convey the minimum “logical and abstract operations.”<sup>211</sup> Plea judges are usually not at risk of being misled by the demeanor of witnesses and could use discretion in plea colloquy.<sup>212</sup> If circumstantial and documentary evidence are presented, judges are on an equal footing with any fact finders. Moreover, there are no barriers for active judges to ask additional questions or to require the prosecution to submit other evidence if some doubts still exist.<sup>213</sup> Overall, it is entirely possible to have fact-finding activity during a plea colloquy.

This Article’s proposal would induce the judge to undertake a more active role, deviating from the currently passive practice—meaningless

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<sup>205</sup> *Id.* at 602. Professor Chad M. Oldfather simply noted that fact finders in trial “can assess not only what a witness says, but also how she says it.” Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 445 (2004).

<sup>206</sup> See *infra* note 234–37 and accompanying text.

<sup>207</sup> This phrase means “the transcripts of testimony and the documentary and physical exhibits introduced at trial.” Findley, *supra* note 204, at 619.

<sup>208</sup> Oldfather, *supra* note 205, at 449–50.

<sup>209</sup> *Id.* at 451–66.

<sup>210</sup> See FED. R. CRIM. P. 11(b).

<sup>211</sup> Oldfather, *supra* note 205, at 456.

<sup>212</sup> See *infra* note 250–52 & accompanying text.

<sup>213</sup> No rule in FRCP prohibits this kind of request from the judge.

formalistic syllogism. For instance, a judge would adhere to the following steps to satisfy his reinvigorated responsibility: (1) before entering the courtroom, the judge would thoroughly read the relevant materials, including a complaint and a police report, to identify facts and issues of the case (in the present stage, the judge may enter the courtroom without thorough knowledge); (2) the judge would hear more detailed facts of the case from the prosecutor, defense attorney, and defendant (at present, the judge is not obligated to listen to the specific facts other than the guilty plea); (3) the judge would require a brief description of the type and content of evidence held by the prosecutor<sup>214</sup> (at present, the judge does not need to review all of the evidence that the prosecution has); (4) the judge would ask for more detailed information of evidence, if he or she is still not satisfied with the standard of proof (this rarely occurs today); (5) the judge would require the prosecution to submit the additional evidence (again, at present, this rarely occurs); (6) the judge would request the sentencing report, postponing the acceptance of guilty plea (once again, this rarely occurs).<sup>215</sup>

The stages illustrated above are all things that a judge could do in plea colloquy. Indeed, there would no obligation for the judge to meet all the steps, if only some prove sufficient in a given case. Depending on different situations, the judge will selectively act to meet the burden of proof. As the proposed burden of proof (preponderance of evidence or clear and convincing evidence) in this Article is not overly high, significant changes to practice are not expected.

The following reforms would support an establishment of the factual basis requirement. First, preparing a plea agreement should involve more sophisticated practice than most states currently require. In this regard, a comparison of federal and state plea agreements provides some insights. Federal prosecution produces a lengthy document containing comprehensive rules and consequences of accepting a plea agreement.<sup>216</sup> It usually includes

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<sup>214</sup> This situation is similar with Professor Maximo Langer's suggestion. *See* Langer, *supra* note 152, at 276–77.

<sup>215</sup> This is already available under the current rule of criminal procedure. “To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.” FED. R. CRIM. P. 11(c) (3)(A).

<sup>216</sup> *Plea Agreement*, U. S. DEP’T JUST. ARCHIVES, <https://www.justice.gov/ag/plea-agreement> (last visited Jan. 27, 2018) (displaying a plea agreement form used in the United States District Court for the Eastern District of Virginia).



detailed fact patterns in guilty pleas: states use less elaborate practices.<sup>217</sup> For instance, Wisconsin prosecutors usually produce a short document that outlines a checklist to waive one's constitutional rights.<sup>218</sup> The process is often improvised with defendants sitting outside a courtroom, shortly before a plea colloquy.<sup>219</sup> Under this practice, it is questionable whether state prosecutors critically review police reports and other evidence to convey factual basis. The judge's critical review of the factual basis requirement is just as limited. The best practice, similar to the federal practice, would not only assist judges in finding a factual basis but would also force prosecutors to thoroughly examine their files.

Second, there needs to be consistency in allowing appeals based on the lack of a factual basis. For example, some federal appellate courts allow appeals based on a lack of a factual basis after defendants plead guilty, but this is not always the case.<sup>220</sup> Moreover, there is an inconsistency even within circuits in allowing defendants to appeal.<sup>221</sup> Among the circuits that allow appeals under a less strict standard, the standard itself is not clear.<sup>222</sup> Various standards, including "de novo," "abuse of discretion," "clearly erroneous," and "plain error" standards, are used when appellate courts evaluate claims of an inadequate factual basis.<sup>223</sup> These variances fail to protect a defendant to differing degrees, depending on the jurisdiction in which the defendant is charged. Strengthening the factual basis requirement will only become possible when these circuit splits are resolved.

Reforming plea bargaining practice will take enormous effort. Given the predominance of plea bargaining in its current practice, even a small change could raise political, institutional, and cultural resistance.<sup>224</sup> It is thus

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<sup>217</sup> See, e.g., State of Wisconsin, Circuit Court, *Plea Questionnaire/Waiver of Rights*, WICOURTS.GOV, <https://www.wicourts.gov/forms/CR-227.PDF> (last visited Jan. 27, 2018) (displaying a plea agreement form used in the circuit court in the State of Wisconsin); *Plea Agreement*, ST. FLA., [http://flcourts18.org/docs/sem/Felony\\_Plea\\_Agreement\\_1\\_06\\_SC18\\_Rev.5-15-14-Eng.pdf](http://flcourts18.org/docs/sem/Felony_Plea_Agreement_1_06_SC18_Rev.5-15-14-Eng.pdf) (last visited Jan. 27, 2018).

<sup>218</sup> See State of Wisconsin, Circuit Court, *Plea Questionnaire/Waiver of Rights*, WICOURTS.GOV, <https://www.wicourts.gov/forms/CR-227.PDF> (last visited Jan. 27, 2018) (displaying a plea agreement form used in the circuit court in the State of Wisconsin).

<sup>219</sup> This is the author's own experience during judicial internship in Dane County Courthouse in Wisconsin.

<sup>220</sup> Schmidt, *supra* note 129, at 313–14.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 295–96.

<sup>223</sup> *Id.*

<sup>224</sup> Packer, *supra* note 36, at 47 ("It is widely asserted that any significant increase in the

important to review the resistances that these proposals might bring and address the concerns about them.

### III. REFUTING ANTICIPATED COUNTERARGUMENTS

#### A. *Concerns for Inertia of Adversary Philosophy*

In the current state of affairs, lawyers are accustomed to the adversarial culture, and judges operate as neutral and passive fact-finders.<sup>225</sup> Even a slight or narrowed judicial intervention might prove to be impossible. Professor William T. Pizzi pointed out that this adversarial obsession arose from American lawyers' misunderstanding of other countries' legal systems and blind faith in the American legal system.<sup>226</sup> "As practitioners, they may be quite excellent at what they do but as law reformers they are timid and unimaginative."<sup>227</sup> It might be difficult to overcome this established standard, even though the trial judges' authority in plea colloquy is grounded in existing procedure.

This deep inertia also shapes the direction of reforms in the legal system. Despite the Innocence Movement, the past three decades have witnessed only minimal change in the adversarial system.<sup>228</sup> Legal

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number of criminal prosecutions going to trial would result in a breakdown of the criminal justice system.").

<sup>225</sup> See Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 714–15 (1983).

<sup>226</sup> See WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT 90–91 (1999). Professor Pizzi states that:

When it comes to what I have been referring to in this book as "continental" or "European" countries, such as Germany, France, or the Netherlands, American lawyers know next to nothing. Sometimes what they think they "know" is worse than knowing nothing. You will occasionally hear leading members of the bar saying things about other western countries—for example, that "in country X the defendant is assumed guilty and must prove he is innocent" or that "in country Y the defendant is not given a trial"—which are untrue for those countries. The tone of such pronouncements usually implies that our trial system is clearly superior to any other, that our lawyers and judges have it all pretty much figured out, and that we have little to learn from other legal systems.

*Id.*

<sup>227</sup> *Id.* at 91. Pizzi points out that American law schools' inadequate education with respect to other countries' legal systems makes creative reforms unimaginable. *Id.*

<sup>228</sup> See Marvin Zalman & Ralph Grunewald, *Reinventing the Trial: The Innocence Revolution and Proposals to Modify the American Criminal Trial*, 3 TEX. A&M L. REV. 189 (2015).

scholarship has mainly focused on the specific causes of wrongful conviction (such as eyewitness misidentification, false confession, and jailhouse snitches), the legal profession (prosecutorial and police misconduct and ineffective assistance of counsel), and psychological effect of legal actors (e.g., tunnel vision).<sup>229</sup> In contrast, scholarship that addresses the trial or pretrial processes has been “comparatively sparse.”<sup>230</sup> The “adversary trial does not appear on any canonical list of wrongful conviction causes,”<sup>231</sup> but “lawyers’ ideology may have blinded them from seeing the trial system itself as a source of error, or changing the adversary trial process may have seemed too theoretical and remote.”<sup>232</sup> Not only are few judges willing to be more active in plea colloquy, but both parties could also be resistant to judicial intervention.

The American adversarial culture views a neutral and passive fact finder as a symbol that should not be infringed.<sup>233</sup> Professor Stephan Landsman mentioned two understandable ideas underlying this preference. He first noted that an “[a]dversary theory suggests that if the decision maker strays from the passive role, he risks prematurely committing himself to one version of the facts and failing to appreciate the value of all the evidence.”<sup>234</sup> This suggests that the adversary theory finds that neutrality and passivity “convince society that the judicial system is trustworthy.”<sup>235</sup> Similarly, Chief Justice John Roberts once revealed his judicial philosophy in his confirmation hearing by describing the role of a judge as limited to that of an umpire, calling balls and strikes, and not of a player, pitching or batting.<sup>236</sup>

The primary concern is that many trial judges do not even perform their minimal roles as final arbiters. Incorporating Justice Roberts’ analogy, it is true that roles of baseball umpires are limited to calling balls and strikes. But they carefully observe the ball’s location with keen eyes and deliberately call balls or strikes during a game. However, it seems that plea judges do not even care so much about the ball’s location—about the substance of a case

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<sup>229</sup> *Id.* at 190–91.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 191.

<sup>232</sup> *Id.* at 192.

<sup>233</sup> See Landsman, *supra* note 225, at 715.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005).

and whether factual basis exists. Their eyes only follow the players to find out whether they properly follow the rules and wear protective equipment—whether defendants appropriately waive their constitutional rights. This baseball analogy may exaggerate the similarities and differences between umpires and judges. Nevertheless, most plea judges arguably consider their roles as merely accepting mutual agreements on the condition that the process is appropriate. The American trial judge's role as final arbiter has become extremely weak and passive.

This deeply entrenched philosophy is the main barrier for this Article's proposal to be realized. When there is no marked dispute between two parties, judges who are not familiar with the facts of the case may not know what actions to take. One who agrees with the baseball umpire analogy would still dislike more strengthened review for the factual basis in plea colloquy. However, the difficulty of realization does not mean that it is impossible. This proposal does not come from nowhere and in fact fits with existing scholarly efforts that seek to heighten the role of judges. The idea of judicial participation in plea negotiation is one of these existing efforts.<sup>237</sup> These efforts are also reflected in the urge to increase reviews of problematic evidence.<sup>238</sup> The attempt to broaden factual review in the appellate process similarly demands a greater judicial role than the present process.<sup>239</sup> Altogether, these efforts will help to overcome the inertia of legal professionals. Momentum generated by those reforms will pave the way for this Article's proposal.

The ways in which plea bargaining has been introduced in European countries provide some lessons to the American plea-bargaining system. At first, the introduction of plea bargaining in Europe faced serious criticism, because it contradicts the fundamental idea of the inquisitorial system: that the state should pursue the truth, not agreement.<sup>240</sup> Conversely, European countries did not implement American-style plea bargaining; they modified

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<sup>237</sup> See Turner, *supra* note 59.

<sup>238</sup> See Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 GA. L. REV. 723 (2013) (discussing judicial gatekeeping about suspect evidence).

<sup>239</sup> Findley, *supra* note 204, at 623 ("Appellate judges can then use that training—that acquired institutional advantage—to engage in more meaningful factual review of cases involving that kind of evidence." (citing George C. Thomas III, *Bigotry, Jury Failures, and the Supreme Court's Feeble Response*, 55 BUFF. L. REV. 947, 973 (2007))).

<sup>240</sup> See Langer, *supra* note 88, at 3–4.

the original plea bargaining to be compatible with their systems.<sup>241</sup> Greater judicial control of plea bargaining in European countries helps remedy many of the problems in the American system.<sup>242</sup> For example, the sentencing disparity between trial and guilty plea is less dramatic in Germany than in America.<sup>243</sup> American legal professionals should recognize that there is no single, eternal plea-bargaining practice. As some already urge modifications of the American plea-bargaining system based on comparative study,<sup>244</sup> it is worth considering taking a different angle, to move into at least a slightly different direction.

#### B. *Concerns about Resources*

Strong concerns about resources are another tough obstacle to this Article's proposal. Many legal professionals consistently raise this issue by noting the crowded dockets of trial courts and limited government personnel.<sup>245</sup> In fact, this was the primary concern when the Supreme Court held that the Constitution does not require impeachment information to be disclosed to the defendant before the guilty-plea stage.<sup>246</sup> In *United States v. Ruiz*,<sup>247</sup> the Court expressly held that mandatory disclosure of impeachment evidence "could require the Government to devote substantially more

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<sup>241</sup> See *Id.* at 3 ("[T]he importation of plea bargaining into these jurisdictions is not likely to reproduce an American model of criminal procedure. Each of these jurisdictions has adopted a form of plea bargaining that contains differences—even substantial differences—from the American model, either because of decisions by the legal reformers in each jurisdiction or because of structural differences between American criminal procedure and the criminal procedures of the civil law tradition.").

<sup>242</sup> Mar Jimeno-Bulnes, *American Criminal Procedure in a European Context*, 21 CARDOZO J. INT'L & COMP. L. 409, 453–54 (2013) (elaborating that in European countries, the "judicial monitoring guarantees the fairness of the deal and should avoid some of the problems related to U.S. plea bargaining; particularly, the lack of legal counsel and the pressure imposed by prosecutors so that the accused accepts the guilty plea").

<sup>243</sup> Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317, 354 (1995) ("German practices appear less likely to cause major sentencing disparities, to encourage initial over-charging, or to create undue risks of convicting the innocent.").

<sup>244</sup> See, e.g., Turner, *supra* note 191, at 115 ("[The German] system seem[s] to do a better job of avoiding plea bargains that are not based on the facts and impose unacceptable risks of coercing innocent defendants to plead guilty. . . . [It] may serve useful model for American reformers interested in curbing the dangers associated with plea bargaining in cases where the evidence is weak.").

<sup>245</sup> See Easterbrook, *supra* note 26, at 552.

<sup>246</sup> *United States v. Ruiz*, 536 U.S. 622, 629–32 (2002).

<sup>247</sup> *Id.* at 622.

resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages.”<sup>248</sup> Particularly, the Court noted that “the added burden imposed upon the Government by requiring its provision well in advance of trial (often before trial preparation begins) can be serious.”<sup>249</sup>

This kind of concern is reasonable. Anyone who visits any county trial court for the first time would be surprised by its long list of plea-hearing cases scheduled in a single day; the time cycles of trial judges and prosecutors are frenetic. It is plausible to argue that this Article’s suggestion, to require a judge to be convinced beyond a certain burden of proof in finding a factual basis requirement, would disrupt the current balance of the plea-bargaining process.

However, there is no reason to treat all cases the same. Exonerations often receive national headlines largely because they were felony offenses involving long-term incarcerations. Thus, as Professor Alexandra Natapoff noted, although wrongful convictions in misdemeanors are also problematic,<sup>250</sup> it would not be unreasonable to focus first on felony cases. To handle felony cases more carefully is also justifiable from a constitutional perspective. The Constitution guarantees the right to jury trial for “serious” offenses,<sup>251</sup> and a right to appointed counsel in limited cases.<sup>252</sup> The same could apply to the factual basis requirement. California already does not require factual basis for a guilty plea to a misdemeanor offense.<sup>253</sup> Similarly, the Supreme Court also flexibly responded to this factual basis requirement in the past. In *Libretti v. United States*, the Court held that a factual basis under Rule 11 of the FRCP is not necessarily required for a stipulated asset, because forfeiture is not part of a conviction.<sup>254</sup>

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<sup>248</sup> *Id.* at 632.

<sup>249</sup> *Id.* at 633.

<sup>250</sup> *See, e.g.,* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1059 (2015).

<sup>251</sup> *Baldwin v. New York*, 399 U.S. 66, 68–69 (1970) (“[N]o offense can be deemed ‘petty’ for purposes of the right to trial by jury where imprisonment for more than six months is authorized.”).

<sup>252</sup> *E.g.,* *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972) (holding that the right to counsel applies to all cases where imprisonment is a possibility); *Gideon v. Wainwright*, 372 U.S. 335, 339–40 (1963) (holding that the right to counsel applies to all criminal cases).

<sup>253</sup> CAL. PENAL CODE § 1192.5 (West 2017).

<sup>254</sup> *Libretti v. United States*, 516 U.S. 29, 38–39 (1995). However, this holding is at risk of reversal after *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because “*Apprendi* eschews the distinction between sentencing factors and elements of a crime.” *United States v. Buckland*,

There is, in fact, an existing way to confirm factual basis without consuming extra resources. The 1966 advisory note on Rule 11 gave additional leeway to establish factual basis “by examining the presentence report.”<sup>255</sup> Using a presentence report in a guilty-plea process would not substantially increase the resource demand, because the report is already scheduled to be prepared for sentencing hearings. Reviewing them in plea colloquy just means consuming the investigation resource a few months earlier. In addition, judges are free to employ these materials because the Rules of Evidence are not applied during plea colloquy.<sup>256</sup>

Lastly, strengthening a judge’s role in a guilty-plea process could also bring a positive change to legal culture and practice. It is well known that the preference for a jury trial is largely based on concerns of the overreaching power of the judicial branch.<sup>257</sup> Thus, a judgment by peers, apparently more democratic, holds a dominant position in the American trial system; bench trials are relatively rare.<sup>258</sup> If a trial judge shows his or her willingness to evaluate the substance of cases with a distinct suspicion, this would reduce prejudice against the judiciary and induce some defendants to choose a bench trial as an alternative. Bench trials are generally more informal and shorter, which saves judicial and prosecutorial resources, thus dealing with this major concern.<sup>259</sup>

### C. *Concerns for Losing Benefits for Defendants*

The third potential problem is that defendants could lose benefits if the courts more rigorously examine plea agreements and accept them only under more stringent standards. Indeed, defendants have enjoyed benefits because of plea bargaining, as the court now accepts plea agreements quickly and on a generous basis. The primary benefit is that defendants can avoid a

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289 F.3d 558, 566 (9th Cir. 2002); *see also* CHARLES ALAN WRIGHT ET AL., *FEDERAL RULES OF CRIMINAL PROCEDURE* § 174 (4th ed. 2017).

<sup>255</sup> FED. R. CRIM. P. 11 advisory committee’s note to 1966 amendment.

<sup>256</sup> *See generally* WRIGHT ET AL., *supra* note 254.

<sup>257</sup> *See* Langbein, *supra* note 2, at 269 (“In America, where the judiciary’s association with the excess of English colonial administration had led the framers to make jury trial a constitutional right, bench trial was all the harder to envision.”).

<sup>258</sup> *Id.* at 269.

<sup>259</sup> Although it is possible to say that a jury trial is sometimes faster, and a bench trial takes more time to reach a decision, *see* Prentice H. Marshall, *A View from the Bench: Practical Perspectives on Juries*, 1990 U. CHI. LEGAL F. 147, 156 (1990), few might argue that a bench trial in fact consumes more resources.

harsh sentence under the current severe punishment policies.<sup>260</sup> Even if defendants can assert innocence because the evidence from prosecution is weak, going to trial can be a dangerous gamble under the severe sentencing policies as they are now. Plea agreements also usually have much shorter sentences.<sup>261</sup> In addition, some defendants, for various reasons, wish to be released earlier from criminal procedure by pleading guilty.<sup>262</sup> By waiving a right to a public trial, they may avoid humiliation before known or unknown persons.<sup>263</sup> Or they might wish to protect victims from being embarrassed if intimate relationships exist. Thus, the current plea-bargaining practice is part of a spontaneous output of current criminal justice policy and defendants' interests.

However, the introduction of more stringent judicial review of the factual basis does not mean that all the current benefits enjoyed by the defendant will disappear. One reason for imposing harsh punishment on defendants who do not plead guilty is that not-guilty pleas lead to the consumption of more government resources.<sup>264</sup> In contrast, this proposal claims that it is the judge, not the defendant, who decides to go to trial when

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<sup>260</sup> See Lippke, *supra* note 199, at 175–78 (noting that “[t]he magnitude of the sentencing concessions” and “[t]he existence of trial penalties” are principle reasons of distinctive “trial avoidance” in America).

<sup>261</sup> See *Id.* at 175 (“Though estimates vary, it seems clear that such sentencing concessions can exceed 50 percent of the statutorily available sentence[.]”).

<sup>262</sup> See *Id.* at 177 (“[P]retrial detention, numerous required court hearings, delays in the onset of trials, the public embarrassment involved in having to appear and answer to charges, foregone earnings from work, and stress on familial and other social relations.”).

<sup>263</sup> See *Id.*

<sup>264</sup> See *Id.* at 176. Professor Lippke explains:

Criminal defendants who refuse to enter guilty pleas, but who instead go to trial and are convicted, are very unlikely to receive the sentence or charge concessions on offer from prosecutors pretrial, assuming that prosecutors saw fit to offer any. Such concessions were proffered as rewards for guilty pleas. But do persons convicted after trials suffer more than the loss of such “waiver rewards”? Many observers believe that they do, that prosecutors often recommend longer sentences than they might have initially deemed appropriate or fair, given the nature of the accusations against persons, simply to punish the convicted for having exercised the right to trial. These vindictively-motivated sentence add-ons are “trial penalties.” Not only can they be substantial, but judges might also go along with them. Judges likewise do not appear to appreciate exercise of the right to trial by many criminal defendants. Assuming they exist, trial penalties swell sentencing differentials.

*Id.* (citation omitted).



a prosecution's file lacks an adequate factual basis. Therefore, at the sentencing hearing, the judge would not consider a trial as an aggravating sentencing factor. Thus, defendants would not need to fear a "trial penalty."<sup>265</sup>

Moreover, this Article does not argue that every case failing to meet a certain standard should be dismissed. This means that, if the evidence shows that defendants obviously receive benefits from a guilty plea, then the judge could be allowed to accept the guilty plea, whether in charge bargaining<sup>266</sup> or sentence bargaining.<sup>267</sup> Charge bargaining might involve a guilty plea to a day offense, even though the factual basis supports a night offense.<sup>268</sup> If so, the judge would have a difficult time finding a factual basis when "the offense to which the plea is made is not a logical[ly] included offense of the crime committed."<sup>269</sup> Sentence bargaining might include a sudden decrease in the amounts of drugs that is seized and already tested in forensic laboratory. However, in those cases, defendants obviously benefit from plea bargaining. Only when there is a significant lack of factual basis as to raise a concern about convicting the innocent, should judges actively establish the factual basis and be deliberate in admitting guilty pleas.

Yet even if all of the criticisms and concerns discussed are irrefutable and unresolvable, plea bargaining itself is not a constitutional right, unlike the right to a jury trial guaranteed by the Sixth Amendment.<sup>270</sup> In other words, rejecting a disposal by guilty plea will not itself harm the defendant from a constitutional perspective.<sup>271</sup>

#### CONCLUSION

Because the concern of wrongful guilty pleas has increased, the accuracy and reliability of plea agreements must be carefully addressed. Nonetheless, in practice, plea bargaining is now substantially being accepted

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<sup>265</sup> *See Id.*

<sup>266</sup> BLACK'S LAW DICTIONARY, *supra* note 34, at 1338 (defining a "charge bargain" as a "plea bargain" whereby a prosecutor agrees to drop some of the counts or reduce the charge to a less serious offense in exchange for a plea of either guilty or no contest from the defendant).

<sup>267</sup> *Id.* at 1339 (defining a "sentence bargain" as an "agreement between a prosecutor and a defendant whereby the defendant stipulates that some facts are true in exchange for the prosecutor's not introducing certain other facts into evidence").

<sup>268</sup> LAFAVE ET AL., *supra* note 21, at 1256.

<sup>269</sup> *Id.*

<sup>270</sup> U.S. CONST. amend. VI.

<sup>271</sup> *See Duncan v. Louisiana*, 391 U.S. 145, 149–50 (1968) (holding that protection by jury trial is said to be "fundamental to the American scheme of justice").

under very low standards of proof. This Article addresses the issues of judges being unconcerned with or inconsistent in the practice of guiding the stages of guilty plea. The Article further suggests that a judge should carefully review the factual basis to avoid a wrongful guilty plea. Although Rule 11(b) of the FRCP requires judges to check the factual basis of guilty pleas, the rule is not given much attention by legal professionals. This shows that the rule itself has a structural problem, which causes judges to improperly enforce it during plea colloquy. Instead of revising the rule, this Article proposes a new interpretation, which will induce judges to confirm the factual bases for such pleas. This practical solution presents a number of advantages: (1) filtering out inaccurate and unreliable guilty pleas, (2) increasing the accountability of the prosecution in guilty pleas, and (3) helping defendants make more informed plea decisions. Some of the concerns associated with the proposal of this Article can be overcome (concerns for inertial of adversary philosophy<sup>272</sup>), reasonably managed (concerns about resources<sup>273</sup>), or understood that they are, in fact, rather exaggerated (concerns for losing profits of defendants<sup>274</sup>). This Article provides the blueprint for a new, better future for all those involved in plea bargaining in America.

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<sup>272</sup> See Part IV.A.

<sup>273</sup> See Part IV.B.

<sup>274</sup> See Part IV.C.